a

SIVAKUMARAN A/L SELVARAJ & 2 ORS.
(SUING THROUGH THEIR MOTHER AND NEXT FRIEND,
SELVI A/P MUTHUSAMY) & ANOR.

v.

b **YU PAN & ANOR.**

HIGH COURT MALAYA, SHAH ALAM
DATO' K.C. VOHRAH J.
[CIVIL CASE NO. 23-83 OF 1991]
18 OCTOBER 1994

c ***TORT : Accident victim committing suicide after accident - Claim for dependency - Section 7 of the Civil Law Act 1956 - Whether deceased's death was foreseeable - Consideration of the rule in The Wagon Mound (No.1) - Whether "thin skull" cases principle applicable - Whether tortfeasor takes his victim as he finds him.***

One Selvaraj a/l Aiyavoo was involved in an accident wherein his motor cycle collided with the motor lorry driven by the first defendant and which motor lorry was d owned by the second defendant. The said Selvaraj a/l Aiyavoo committed suicide some 9 months after the accident and the plaintiffs brought a dependency claim under s. 7 of the Civil Law Act 1956 against the defendants.

The defendants argued that the death of the deceased through suicide was not foreseeable and sought to rely on the rule enunciated by the Privy Council in *The* e *Wagon Mound (No.1)* case. The plaintiffs, on the other hand, argued that the tortfeasor takes his victim as he finds him and relied on the case of *Pigney v. Pointers Transport Services Ltd.*

Before dealing with the issue of whether the principle of foreseeability or that a tortfeasor takes his victim as he finds him applied in this case, the Court dealt with the issue of negligence. The Court held that as the defendants had failed to give f evidence in rebuttal of the evidence produced by the plaintiff, namely the deceased's police report and the sketch plan, the first defendant was wholly liable for the accident involving the deceased on that fateful day.

Held:

g **[1]** There was no evidence at all to the effect that the victim's suicide was a normal reaction to his injuries. The deceased's wife in fact stated that she did not expect her husband to commit suicide. As the suicide was not a normal reaction to the accident, the suicide was not in fact foreseeable.

[2] As to the question whether the suicide was an abnormal reaction and therefore came within the "thin skull" rule, there was no evidence whatsoever that the deceased suffered from a psychological predisposition towards depression. In fact h the evidence was that he was a perfectly healthy man before the accident. In the circumstances, the suicide did not fall within the "thin skull" principle that a tortfeasor takes his victim as he finds him, and the dependency claim must necessarily fail.

[Dependency claim dismissed with costs].

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Cases referred to:
Overseas Tankship (UK) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound) [1961] AC 388 ***(refd)***
Pigney v. Pointers Transport Services Ltd. [1957] 1 ALL ER 807 ***(refd)***
Re Polemis & Furness, Withy & Co. Ltd. [1921] 3 KB 560 ***(refd)***
Jaswant Singh v. Central Electricity Board and Anor [1967] 1 MLJ 272 ***(refd)***
Ling Nam Rubber Works v. Leong Bee & Co. [1968]1 MLJ 216 (FC) ***(refd)***
Leong Bee & Co. v. Ling Nam Rubber Works [1970] 2 MLJ 45 (PC) ***(refd)***
Ang Chai Ha & Ors v. Sri Jaya Transport Co. [1974] 1 MLJ 87 (HC) ***(refd)***
Government of Malaysia & Ors v. Jumat bin Mohamad & Anor [1977] 2 MLJ (FC) ***(refd)***
Smith v. Leech Brain & Co. Ltd. [1969] 3 ALL ER 1159 ***(refd)***
Dulieu v. White & Sons [1901] 2 KB 669 ***(refd)***
Oman v. McIntyre SLT 168 ***(refd)***
Warren v. Scruttons Ltd. [1962], Lloyd's Rep 497 ***(refd)***
Robinson v. Post Office [1974] 2 ALL ER ***(refd)***
William [1961] 77 LQR 179, 196 ***(refd)***
Cotic v. Gray [1981] 124 DLR (3rd) 641 ***(refd)***
Swami v. Lo [1979] 105 DLR 93d 451 ***(refd)***

Legislation referred to:
Civil Law Act 1956 s. 7

Other sources referred to:
Textbook of Torts, A Jones, 4 ed. (1994) pp. 167, 168

For the plaintiffs - Manjeet Singh; M/s. Manjeet & Associates
For the defendant - Ronnie Yap; M/s. Othman Hashim & Co.

JUDGMENT

K.C. Vohrah J:
Encik Selvaraj a/l Aiyavoo was involved in an accident on 26 June 1990 where his motor cycle collided with the motor lorry driven by the 1st defendant. He suffered several injuries to his person. About some 9 months after the accident, on 19 March 1991, the poor man committed suicide; he hanged himself.

The widow of the deceased (the 4th plaintiff in this case) and her three minor children (the 1st, 2nd and 3rd plaintiffs acting through their next friend, the 4th plaintiff) have sued the 1st defendant and the 2nd defendant (the owner of the lorry) for damages.

The claim is a dependency claim under s. 7 of the Civil Law Act 1956 which the defendants resist on the main ground, having regard to the decision of the Judicial Committee of the Privy Council in *Overseas Tankship (UK) Ltd. v. Morts Dock & Engineering Co. Ltd.* (*The Wagon Mound*) [1961] AC 388 (*The Wagon Mound No. 1*), that the rule in *The Wagon Mound (No. 1)* applies. There it was held that the essential factor in determining liability for the consequences of a tortious act of negligence is whether the damage is of such a kind as the reasonable man should have foreseen. The defendants argue that death of the deceased through suicide was not foreseeable by the 1st defendant. The plaintiffs on the other hand argue that the principle to adopt in this case is that a tortfeasor takes his victim as he finds him.

Negligence

Before I deal with the issue whether the principle of foreseeability or that a tortfeasor takes his victim as he finds him applies in this case let me deal with the issue of negligence in the accident.

The only evidence which the plaintiffs can rely on is the police report made by the deceased which is an agreed document (page 14 of agreed bundle of documents) and the sketch plan produced by police officer Abdul Razak bin Siman. The defendants were absent at the trial. There was no explanation for their absence but their pleadings admit that the 1st defendant was driving the motor lorry that collided with the motor cycle ridden by the deceased.

The report made by the deceased shows that on 26 June 1990 at about 7.30 p.m. he was proceeding from the direction of Kuala Lumpur towards Rawang along the main Kuala Lumpur - Ipoh road. As he approached a junction between this main road and a lane on his right a lorry (driven by the 1st defendant) came out from this lane and turned towards Kuala Lumpur. The deceased tried to brake his motor cycle but he knocked into the lorry and he suffered injuries to his person. The police sketch was not helpful. It merely showed the motor lorry on the tarred sidetable of the left side of the road as one faces Kuala Lumpur and slightly ahead of the junction. On the opposite side of the road was shown the motor cycle on the tarred sidetable of the right side of the road. There was evidence by the police officer who stated that while the motor cycle was damaged in the front area the damage to the big lorry was at the rear right wheel.

In the absence of a rebuttal by the defendants (who could have given evidence if they had been present at the trial) of the version given by the deceased of the accident in his police report there was a high probability that the 1st defendant had shot out of a minor road on to the main road without due care and attention and as a result the motor cycle collided into the lorry. That the rear right wheel of the lorry was damaged, in the absence of an explanation by the 1st defendant or some other witness or evidence, indicated in all probability that the lorry turned to its right in the direction of Kuala Lumpur at a fast speed. I hold the 1st defendant wholly liable for the accident involving the deceased that fateful day.

Quantum

Assuming the plaintiffs can succeed in this dependency claim in the particular circumstances of this case, the evidence of the 4th plaintiff was that the deceased earned about RM1,300 per month as an oil palm plucker. She produced 5 envelopes (P1A to E) written with Tamil characters and figures which she said were given to her husband by his employer. She could not trace the employer. Four of these showed that for 10 February 1990 the deceased earned RM1,400, for 10 March 1990, RM1,400, for 10 April 1990, RM1,225.18 for 10 May 1990, RM1,300. The monthly average was about RM1,300. There was no serious dispute as to that amount. What was disputed was her evidence that the deceased gave her RM900 towards expenses for the family, but as Counsel for the plaintiff himself indicated, having regard to the fact he had a motor cycle to maintain and that he had most of his meals outside the house during work,

RM800 was the more reasonable amount that was received by the family. The deceased was 30 years old at the time of his death and the number of years of purchase being 16 the plaintiffs are entitled to RM153,600 on the dependency claim assuming the plaintiffs are in law entitled to a dependency claim in the circumstances of the case where death was by suicide. The 4th plaintiff, the widow, is entitled, again if she is in law entitled to a dependency claim, to the sum of RM10,000 for bereavement.

Whether plaintiffs entitled to dependency claim

In the motor accident the deceased suffered a broken jaw which was displaced. He broke his right femur and he suffered cerebral concussion. He had oral surgery done to his jaw and the fracture was repaired. According to the 4th plaintiff her husband had metal plating done to his fracture in his right leg and he had to use crutches till his suicide.

The 4th plaintiff said that her husband was badly affected by the accident. He used crutches to walk and because his jaw was broken it was difficult to talk; and it was difficult to understand him. He could not work and they became very poor. She started to work and he was disturbed that he had to depend on her and the family for his needs including his toilet needs. She said she went to pawn her "Tali" (the marriage badge or symbol of wedding day) without his knowledge to get money to send him to hospital and he was broken hearted over that.

There was no medical evidence adduced as to the state of his mind but it is pertinent to note that the 4th plaintiff stated that she did not expect her husband to commit suicide.

It was the evidence of the 4th plaintiff that her husband was healthy before the motor accident. No evidence was adduced to show that he suffered from a latent physical or psychological predisposition to a particular injury or illness before the accident.

The plaintiffs rely on the case of *Pigney v. Pointers Transport Services Ltd.* [1957] 1 All ER 807 where a man was injured in the course of his employment by the defendants and in circumstances in which they were liable to the man for negligence. After the accident the man suffered from anxiety neurosis and this mental condition was brought about by his accident. The man's widow was held entitled to damages as the damage sustained by her was damage due to the man's death and that was directly traceable to the man's injury in the accident for which the defendants were responsible. The case of *Re Polemis & Furness, Withy & Co. Ltd.* [1921] 3 KB 560 (*Re Polemis*) was applied in the case. This case was before the case of *The Wagon Mound (No. 1).*

Re Polemis & The Wagon Mound (No. 1)

It has to be noted that the Privy Council case of *The Wagon Mound (No. 1)* has been applied in Malaysia. In *Jaswant Singh v. Central Electricity Board and Anor* [1967] 1 MLJ 272, Gill J (as he then was), explained (at 275) the rule that was established by *Re Polemis* and its supersession by the rule enunciated by the Privy Council in *The Wagon Mound No. 1*:

> As regards damage in consequence of a breach of a duty to take care, the fundamental rule is that the injury suffered by the plaintiff must not be too remote a consequence of the defendants' conduct, or, as it is often said, the damage must

> not be too remote. In this connection, on the authority of the decision of the Court of Appeal in England in the case of *Re Polemis and Furness, Withy & Co. Ltd.*, the rule was that if a reasonable man would have foreseen any damage to the plaintiff as likely to result from the defendant's act, then he was liable for all direct consequences of it suffered by the plaintiff whether a reasonable man would have foreseen them or not, that is, if they were directly traceable to the act and not due to the operation of independent intervening causes. That rule was abrogated by the Judicial Committee of the Privy Council in the case of *Overseas Tankship (U.K.), Ltd. v. Morts Dock & Engineering Co., Ltd. (The Wagon Mound)*, in which it was decided that "the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen," and that it is wrong to use one test (reasonable foreseeability) to determine culpability, i.e. duty and breach of duty, and a different test (directness) to determine remoteness of damage. In other words, the test of remoteness is to be treated as being identical with the test of negligence. The test of duty is foreseeability of some damage to the plaintiff. The test of damage is that the kind and the extent of the plaintiff's damage should have been foreseeable in general outline.

The rule in *Wagon Mound (No. 1)* has been discussed and accepted as applicable in Malaysia in several other Malaysian cases including *Ling Nam Rubber Works v. Leong Bee & Co.* [1968] 1 MLJ 216 (FC), *Leong Bee & Co. v. Ling Nam Rubber Works* [1970] 2 MLJ 45 (PC), *Ang Chai Ha & Ors v. Sri Jaya Transport Co.* [1974] 1 MLJ 87 (HC), *Government of Malaysia & Ors v. Jumat bin Mohamad & Anor* [1977] 2 MLJ (FC).

In England, however, in *Smith v. Leech Brain & Co. Ltd.* [1969] 3 All ER 1159 Lord Parker C.J. sitting as trial Judge considered the rule in *The Wagon Mound (No. 1)* and expressed this view, at 1161, that he was satisfied that the Judicial Committee in the *Wagon Mound* did not have the "thin skull" cases in mind and in such cases "it has been the law of this country that a tortfeasor takes his victim as he finds him." He then referred to a short passage in the decision of Kennedy, J in *Dulieu v. White & Sons* [1901] 2 KB 669 where he said:

> If a man is negligently run over or otherwise negligently injured on his body, it is no answer to the sufferer's claim for damages that he would suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.

Lord Parker continued:

> To the same effect is a passage in *The Arpad* [1934] All ER Rep 326. But quite apart from these two references, as is well known, the work of the Courts for years and years have gone on that basis. There is not a day that goes by where some trial Judge does not accept that principle, that the tortfeasor takes his victim as he finds him. If the Judicial Committee had any intention of making an inroad into that doctrine, I am quite satisfied that they would have said so.

In the case before Lord Parker the plaintiff's husband was burned on the lip by a piece of molten metal. The burn was treated and healed but he died of cancer and it was found that the burn promoted cancer in tissues which already had a pre-malignant condition. Parker CJ held the defendants liable as, as was stated earlier, for the purpose of assessing damages a tortfeasor took his victim as he found him and *The Wagon Mound* did not override this principle. Since the type of injury which the deceased suffered was reasonably foreseeable, the defendants were liable for the damages claimed, although they could not reasonably

have foreseen the ultimate consequences of the injury, *viz*, that the burn would cause cancer from which the man would die (see headnote at p. 1159).

In elaborating on the principle that if the Judicial Committee had any intention to make an inroad into the doctrine that the tortfeasor takes his victim as he finds him, they would have said so, Lord Parker stated:

> It is true that, if one takes the wording in the advice given by Viscount Simonds in *The Wagon Mound* and applies it strictly to such a case as this, it could be said that they were dealing with this point. But, as I have said, it is, to my mind, quite impossible to conceive that they were, and, indeed, it has been pointed out that they disclose the distinction between such a case as this and the one which they were considering when they comment on *Smith v. London & South Western Ry. Co.* [1870] LR 6C p 14. Lord Simonds, in dealing with that case in *The Wagon Mound*, said this:
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> > Three things may be noted about this case: the first, that, for the sweeping proposition laid down, no authority was cited; the second, that the point to which the Court directed its mind was not unforeseeable damage of a different kind from that which was foreseen, but more extensive damage of the same kind ...
>
> In other words, Lord Simonds is clearly there drawing a distinction between the question whether a man could reasonably anticipate a type of injury, and the question whether a man could reasonably anticipate the extent of injury of the type which could be foreseen. The Judicial Committee were, I think, disagreeing with the decision in *Re Polemis* that a man is no longer liable for the type of damage which he could not reasonably anticipate. The Judicial Committee were not, I think, saying that a man is only liable for the extent of damage which he could anticipate, always assuming the type of injury could have been anticipated. That view is really supported by the way in which cases of this sort have been dealt with in Scotland. Scotland has never, as far as I know, adopted the principle laid down in *Re Polemis*, and yet I am quite satisfied that they have throughout proceeded on the basis that the tortfeasor takes the victim as he finds him.

As has been pointed out by A. Jones in his **Textbook of Torts** 4 ed. [1994] at 167, whatever the theoretical reconciliation of *The Wagon Mound* and the thin-skull rule, subsequent cases have confirmed Lord Parker's view in *Smith v. Leech Brain & Co. Ltd.* that the rule survived the sinking of *Re Polemis* (see, eg. *Oman v. McIntyre* SLT 168; *Warren v. Scruttons Ltd.* [1962], Lloyd's Rep 497).

Jones (at 168) discussed *Robinson v. Post Office* [1974] 2 All ER and drew conclusions from this case and helped explain *Pigney*. In *Robinson* the plaintiff was injured as a result of the defendants' negligence. When he sought medical treatment he suffered a serious allergic reaction to an anti tetanus injection given to him by a doctor. The Court of Appeal held the defendants liable for this injury stating that a person who could reasonably foresee that the victim of his negligence may require medical treatment is liable for the consequences of the treatment "although he could not reasonably foresee these consequences or that they could be serious".

As was pointed out by Jones there was no question in the case of the **type** of consequences being foreseeable provided the need for treatment is foreseeable (emphasis by Jones) and according to him this explains such a case as *Pigney* where the defendant were held liable for the suicide of the plaintiff's husband

during a depressive mental illness induced by a severe head injury for which the defendants were liable. It is hard not to agree with such a conclusion.

Jones quoted *William* [1961] 77 LQR, 179, 196 who succinctly observed:

> Either the victim's suicide was a normal reaction to his injuries, or it was abnormal. If it was normal, it should be taken as reasonably foreseeable; if was abnormal, it comes within the thin-skull rule as applied to [psychological] states.

The above view was applied by the Ontario Court of Appeal in *Cotic v. Gray* [1981] 124 DLR (3rd) 641 where the facts of the case were almost similar to *Pigney* save that the deceased in *Cotic*, who had committed suicide had a psychological predisposition to emotional upsets and fits of severe depression.

In *Cotic* the plaintiff's husband suffered serious injuries when the car he was driving collided with another car, whose driver was killed. As earlier pointed out, prior to the accident the plaintiff's husband was subject to emotional upset and to fits of severe depression. Following the accident his condition degenerated from a neurotic to a psychotic condition. Sixteen months later he committed suicide. The plaintiff brought an action for damages for wrongful death against the estate of the other driver. At the trial before a jury of the plaintiff's action, the defendant admitted liability for the motor vehicle accident. The parties agreed that only the following question should be asked of the jury: "Did the defendant cause or contribute to the death of the ... plaintiff's husband by the motor vehicle accident in question?" The jury answered the question in the affirmative and the trial Judge gave judgment for the plaintiff. The defendant appealed to the Ontario Court of Appeal.

The Court of Appeal dismissed the appeal.

In a long and elaborate judgment Lacouciere J.A. considered *Re Polemis*, *The Wagon Mound*, *Pigney*, *Leech Brain*, *Dulieu v. White & Sons* and a Canadian case *Swami v. Lo* [1979] 105 DLR 93d 451 (dealing with a dependency claim following the suicide of a deceased allegedly as a result of injuries suffered in a motor vehicle accident) amongst several other cases including 2 cases from New Zealand dealing with a similar issue and with issues of sanity of persons who committed suicide and came to the conclusion that the appeal should be dismissed. Weatherston JA concurred with him. Watson JA also agreed that the appeal should be dismissed. The view of the Lacouciere JA, with Weatherston concurring, was this (see headnote at p 641):

> Defendant argued that foreseeability of some physical injury resulting in death as a result of the defendant's negligent driving is insufficient, because death by suicide is damage of a different character which the reasonable person in the position of the defendant would not have foreseen. However the "remoteness - foreseeability" argument is interwoven with two other principles which must be considered, namely, the "egg-shell" or "thin-skull" doctrine because of the deceased's vulnerability by reason of his history of mental illness, and the *novus actus interveniens* defence or the alleged break in the chain of causation by the deceased's suicide. The negligent driving of the defendant was not in dispute. The only concern was with the limits or the extent of liability for conduct which was admittedly negligent. It was unnecessary to decide whether the deceased's suicide was foreseeable in the general sense as a consequence of a kind which human experience indicates may result from an injury, or whether the suicide was

unforeseeable but treated as an exception to the foreseeability requirement. In any case, it must be assumed that the jury accepted the medical evidence that the deceased, by reason of his history of emotional problems was exceptionally vulnerable to a psychotic reaction following a motor vehicle accident. Because of the so-called "egg-shell" or "thin skull" principle, the defendant has to take his victim as he finds him, a psychologically vulnerable individual. It must also be assumed that the jury were satisfied, on a preponderance of the evidence, that the accident, while not necessarily the sole cause, was a direct and substantial cause without which the suicide would not likely have happened.

Coming back to the facts of the case before this Court, was the victim's suicide a normal reaction to his injuries? The answer is in the negative. There was no evidence at all to that effect. The deceased's wife in fact stated that she did not expect her husband to commit suicide. His suicide was not a normal reaction to the accident. The suicide was not foreseeable. As to the question whether the suicide was an abnormal reaction and therefore came within the thin-skull rule the plaintiff's Counsel argued that the deceased "took his life because of his poverty". With respect I do not see the relevance of his point if he is relying on the thin-skull principle that a tortfeasor takes his victim as he finds him. There was no evidence whatsoever that the deceased suffered from a psychological predisposition towards depression; in fact the evidence was that he was a perfectly healthy man before the accident.

In the circumstances the dependency claim must fail. The claim is dismissed with costs.